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In the Supreme Court of the United States

OCTOBER TERM 1964

No. .....

NATHANIEL E. BERRY,

Plaintiff-Appellant,

v.

STATE TAX COMMISSION,

Defendant-Appellee.

On Appeal From the Supreme Court of the State of Oregon

MOTION TO DISMISS

Appellee in the above-entitled case, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the decree of the Supreme Court of the State of Oregon be dismissed on the grounds that the appeal does not present a substantial federal question worthy of further argument.

OPINIONS BELOW

1. *Opinion of Oregon Supreme Court.* The opinion of the Oregon Supreme Court and the dissenting opinion are reported in 79 Or. Adv. Sh. 689, 397 P2d 780 (1964) and are printed in Appendix A, pp. A1 to A8 of Appellant's Jurisdictional Statement and the opinion deny-

ing the Petition for Rehearing is reported in 80 Or. Adv. Sh. 179, 399 P2d 164 (1964), and is printed in Appendix A, pp. A10 to A11 to Appellant's Jurisdictional Statement.

2. *Opinion of Oregon Tax Court.* The opinion of the Oregon Tax Court is reported in 1 OTC Adv. Sh. 483 (1964), and is printed in Appendix A, pp. A12 to A19 to Appellant's Jurisdictional Statement.

3. *Opinion of State Tax Commission.* The opinion of the State Tax Commission is not reported but is printed in Appendix A, pp. A19 to A24 to Appellant's Jurisdictional Statement.

QUESTIONS PRESENTED

Without quoting the alleged questions set forth in Appellant's Notice of Appeal and Jurisdictional Statement, appellee believes the questions can be stated more simply as follows:

1. Does the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibit the State of Oregon from imposing a personal income tax upon nonresidents which allows as deductions to residents certain personal expenses but which allows the same to nonresidents only to the extent that such expenses are connected with income arising from sources within Oregon which is taxed to them?

2. Does the Privileges and Immunities Clause of the United States Constitution prohibit such taxation?

3. Does the Oregon Admissions Act, either alone or in connection with the Supremacy Clause of the United States Constitution prohibit such taxation?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Appellant has set forth satisfactorily the applicable statutes and constitutional provisions involved in Appendix B of Appellant's Jurisdictional Statement except for the quotations of the Oregon Admissions Act, Act of [Congress of] February 14, 1859, Section 4, 11 Stat. 383, and Act of June 3, 1859, Section 1, [Oregon] First Extra Session, 29; Deady's Laws, 1866, 132; Vol. 5, p. 1169, Oregon Revised Statutes; which as quoted, omit and delete portions pertinent to the understanding of the material and which are set forth more fully herein as Appellee's Appendix A, pp. 15–17.

STATEMENT OF THE CASE

This is an appeal by Mr. Nathaniel Berry, at all times pertinent hereto a resident of the State of California. The appeal is from an assessment of additional income taxes, together with penalty and interest, by the Oregon State Tax Commission for the calendar year 1959. In the calendar year 1959 the appellant received income from an Oregon trust and had no other income except for $52.42 interest income received from sources within the State of California. The assessment of additional taxes arises from the disallowance of certain personal deductions claimed upon appellant's income tax return filed by him with the State of Oregon. The deductions disallowed consisted of $2,728.75 medical-dental expense, the payment of interest on loans in California totalling $759.53 and miscellaneous amounts for union dues, bank

fees, car insurance and telephone expense totalling $553.32, none of which (it is conceded) was incurred in connection with income earned in Oregon.

The appellant received income from an Oregon trust established by his father and part of the trust property consists of certain real property located in Oregon. It has never been contended that appellant has at any time pertinent hereto been the owner or proprietor of any real property situated within the State of Oregon.

The tax asserted is not an ad valorem property tax but is an income tax asserted solely with respect to income received by the appellant as a beneficiary of the Oregon trust. The sole basis for the disallowance of the deductions by the Oregon State Tax Commission was that the deductions claimed were not connected with income arising from sources within the State of Oregon or property having a situs for taxation within the State of Oregon as required by ORS 316.360 of the tax laws of the State of Oregon.

The principal question in the opinion of the appellee concerning the disallowance to appellant of deductions which would have been allowable to residents is whether or not this is discriminatory under the provisions of the Equal Protection or the Privileges and Immunities Clause of the Constitution. Although appellant pleaded contravention of the Oregon Admissions Act in the lower court, the contention that such was in violation of the Supremacy Clause does not appear to have been brought before the lower court.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A. The Oregon Income Tax Act Under Attack Is Not Discriminatory With Respect to Nonresidents Under Either Section 2, Article IV, or Section 1, of the Fourteenth Amendment of the United States Constitution.

ORS 316.325 allows certain deductions to taxpayers in arriving at taxable net income in a manner similar to Federal Income Tax Laws. These deductions are set forth in ORS 316.305 through ORS 316.350 and include business expenses, casualty losses, theft losses, business and nonbusiness interest expenses, contributions, medical expenses, etc. ORS 316.360[1] allows the foregoing deductions to nonresidents but only to the extent that such expenses are connected with Oregon income taxable to the nonresident. All such expenses are allowable to residents. Appellant's expenses (chiefly interest and medical-dental expenses) are conceded not to be connected with Oregon income.

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[1] "316.360. (1) Subject to subsection (2) of this section, in the case of a nonresident taxpayer the deductions allowed by ORS 316.305 to 316.350 shall be allowed only if and to the extent that they are connected with:

"(a) Income which arises from sources within the State of Oregon and which is taxed to a nonresident taxpayer under this chapter; or

"(b) Property having a situs for taxation within the State of Oregon.

"(2) The deduction prescribed in ORS 316.340, and as therein limited, shall be allowed to a nonresident taxpayer but only with respect to contributions or gifts within the tax year to the United States, the State of Oregon or any political subdivision thereof for use exclusively for public purposes within the State of Oregon, or to a corporation or association described in ORS 316.340, or a chapter or branch thereof, located within the State of Oregon.

The basis for distinguishing between residents and nonresidents for tax purposes under such circumstances inherently rests upon the plenary taxing power of the state which may tax all of the income of its residents wherever earned but which is limited with respect to the taxation of nonresidents except as to income arising from sources within the taxing state. The state exercises dominion over its own citizens and is concerned with their medical expenses, casualty losses, expenses, etc. The expenditures of nonresidents are more likely to be in proportion to income not taxable by the state and are not situated so as to be readily accessible to audit.

The question raised by this appeal is not a new one. It was first raised with respect to the New York income tax law in 1919 (L. 1919, chap. 627) challenged in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228, 64 L. Ed. 460 (1920), decided by the United States Supreme Court March 1, 1920, together with *Shaffer v. Carter*, 252 U.S. 37, 40 S. Ct. 221, 64 L. Ed. 445 (1920), a case involving the constitutionality of the Oklahoma income tax law.

In the two cases, the first question presented concerned the power of a state to tax the income of a resident of another state. In the *Shaffer* case, after upholding the state's power to tax nonresidents upon income earned within Oklahoma, the validity of a provision similar to Oregon's was sustained.[3]

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[3] "* * * As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the state, and it accords to them a corresponding

Mr. Justice Pitney, who wrote both decisions, was of the opinion that deductions, either business or nonbusiness, were properly disallowed by the taxing state except to the extent connected with income. Thus, in the *Travis* case the Court upheld the right of New York to disallow personal deductions to nonresidents (N. Y. Law, Sec. 360) but refused to allow differing exemptions, striking down provisions (sec. 362) providing for different exemptions as between residents and nonresidents. The Court unmistakably dealt with the propriety of restricting deductions to those connected with income arising from sources within the state.[8]

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privilege of deducting their losses, wherever these accrue. As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred. * * *" (252 U.S. 37, 57)

[8] "In section 360 provision is made for deducting in the computation of net income expenses, taxes, losses, depreciation charges, etc.; but, by paragraph 11 of the same section:

" 'In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state. * * *'

* * *

"[1, 2] That the state of New York has jurisdiction to impose a tax of this kind upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders, enforcing payment so far as it can by the exercise of a just control over persons and property within the state, as by garnishment of credits (of which the withholding provision of the New York law is the practical equivalent), and that such a tax, so enforced, does not violate the due process of law provision of the Fourteenth Amendment, is settled by our decision in Shaffer v. Carter, State Auditor, 252 U.S. 37, 40 Sup. Ct. 221, 64 L. Ed. ——, this day

New York deleted the offending exemption provision (sec. 362) from its laws and subsequently the case arose of *Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 NY2d 172 (1955), 1 NY2d 680, 133 NE2d 711 (1956), dismissed per curiam 352 U.S. 805, 77 S. Ct. 47, 1 L. Ed2d 38 (1956), which was substantially identical to the instant case.

The taxpayer in the *Goodwin* case was a New Jersey resident who was an attorney and whose income was entirely earned in the State of New York. In the State of New Jersey, the taxpayer incurred personal expenditures consisting of real estate taxes $302.03, mortgage interest $669.23, medical expense $1,298.33, and life insurance premiums $150.00, totalling $2,419.59. The contention was that New York discriminated as between residents and nonresidents by allowing such expenses to residents and denying them to nonresidents. The taxpayer pleaded discrimination under Section 2 of Article IV of the United States Constitution and Section 1 of the Fourteenth Amendment thereto. The New York court, in holding that there was no discrimination, relied upon the cases cited above of *Shaffer v. Carter*, 252 U.S. 37, *supra*, and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, *supra*. The determination in the *Goodwin* case is so

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announced, involving the Income Tax Law of the state of Oklahoma. That there is no unconstitutional discrimination against citizens of other states in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state, likewise is settled by that decision." (252 U.S. 60, 73-76)

parallel to the instant situation and the reasoning of the lower court so applicable that appellee's argument on the point is readily summed up by quotation from that decision.[6]

The *Shaffer* and the *Travis* cases have been generally accepted as law. See Solomon, *"Nonresident Personal Income Tax: A Comparative Study in Eight States,"* 29 Fordham L. Rev. 105, 140 (1960), and Culp, *"Selected Problems in Multi-State Taxation,"* 44 Iowa L. Rev. 280 (1959).

For further illustrative purposes one might consider the deduction of interest, assuming arguendo that non-

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[6] "In the *Travis* case (the New York State Income Tax case), the Court first considered the provision of section 360 of the Tax Law 'for deducting in the computation of net income expenses, taxes, losses, depreciation charges, etc.;' but limiting such deductions in the case of a non-resident to such as 'are connected with income arising from sources within the state' (252 U.S. at p. 73). The Court held this provision to be valid upon the basis of its decision in the *Shaffer* case:

" 'That there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of nonresident taxpayers to such as are connected with income arising from sources within the taxing State, likewise is settled by that decision [*Shaffer v. Carter*]' (pp. 75-76)

* * *

"The Attorney General maintains that the *Travis v. Yale and Towne* case disposes of the very point which the plaintiff seeks to raise here. He directs attention to the fact that, in the brief submitted on behalf of the appellee in the Supreme Court in that case, its counsel pointed out, as an illustration of the discriminatory nature of the New York statute, that, under section 360, a resident of New York could deduct real estate taxes upon his home while a resident of Connecticut, working in New York, would not be allowed to do so. The statement by the Supreme Court quoted above, upholding the provisions of section 360, seems to have been intended as a direct answer to this contention." (1 NY2d 680, 696)

residents were allowed to fully deduct interest on the same basis as residents. Oregon allows to residents as a deduction interest (business or nonbusiness) wherever incurred. If nonresidents were allowed to deduct all interest incurred everywhere against income taxable by Oregon it would be possible for a nonresident to erase all of his Oregon taxes. For example, assume that an individual could borrow money at 6 percent interest and invest the funds obtained so as to achieve an income equal to interest paid. Merely by incurring sufficient interest expense the taxpayer could create a deduction large enough to offset all of his Oregon income. The taxpayer would be reimbursed his interest expense by having out-of-state income resulting from the investment but Oregon would not be able to tax such income since it would be earned outside of the State of Oregon by a nonresident.

In the *Travis* case, 252 U.S. 60, *supra*, the New York statute (section 362) which was held discriminatory permitted exemptions of $1,000 for a single person, $2,000 for a married person with $200 as an additional exemption for each dependent, but withheld similar exemptions to nonresidents. In order to obtain such an exemption no actual expenditure or loss must be incurred. By the allowance of varying exemptions it is obviously possible for the taxing state to vary the actual rate of taxation. Thus, an exemption is basically one method of varying the tax rate and, while there may be a basis for allowing differing exemptions as between single persons and married persons, no such valid distinction exists between

residents and nonresidents. At the same time it is fair to note that the expenditures of noncitizens are likely to be in proportion to income not taxable by the state and whereas the state exercises dominion over its own citizens and their losses, expenses, etc., are of concern to the state, nevertheless, the only connection between a nonresident and the taxing state is the jurisdiction over income received from sources within the state.

B. The Oregon Admissions Act Has No Application to a Nonresident Who Is Not the Proprietor of Real Property Located Within the State.

In 1859 the State of Oregon adopted a constitution of state government and applied for admission into the union on an equal footing with other states. Congress, on February 14, 1859, enacted 11 Stat. 383 and in section 4 thereof offered certain propositions to the people of Oregon for their free acceptance or rejection which, if accepted, would be obligatory upon the United States and upon the State of Oregon. The first proposition was that certain lands would be granted to Oregon to be used for schools. The second proposition was that 72 sections of land would be reserved for the use and support of a state university. The third proposition was that ten sections of land would be granted to the state for an erection of a seat of government. The fourth proposition gave to the state certain salt springs located within the state. The fifth proposition was that 5 percent of the net proceeds of sales of public lands within the state would be paid over to Oregon for the purpose of making public roads and internal improvements. It was further

provided that the foregoing propositions were offered on the condition that the people of Oregon would provide that the state would not interfere with the primary disposal of soil within the state by the United States or with any regulations necessary for securing the title in said soil to bona fide purchasers thereof; "* * * and that in no case shall non-resident proprietors be taxed higher than residents. *Sixth*, And that the said state shall never tax the lands or the property of the United States in said state: * * *"

By Act of June 3, 1859, Section 1, First Session, 29; Deady's Laws, 1866, 132; Vol. 5, p. 1169, the State of Oregon accepted the propositions offered by the Congress of the United States as set forth above. After restating the propositions verbatim which had been offered, the acceptance provided "* * * and that in no case shall non-resident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States in said state: * * *"

It seems obvious that the parties were only concerned with the possibility of a tax to be levied upon the proprietors of land. Income taxes were nonexistent at either the federal level or state level at the time. It is conceded that, with respect to ad valorem taxes, Oregon may not tax nonresident-owned land at a different rate than land owned by residents. An income tax is levied upon the recipients of income and does not of course single out "proprietors", either resident or nonresident.

The Oregon Supreme Court did not offer any inter-

pretation of the Oregon Admissions Act and presumably did not deem it pertinent with respect to the interpretation of the income tax laws. However, the opinion of the Oregon Tax Court (Appendix to Jurisdictional Statement, p. A18) stated as follows:

> "* * * This court's interpretation of ORS 316.360 does not violate this irrevocable ordinance. Whether residents or nonresidents, all businessmen may deduct their Oregon business expenses from their Oregon business income under ORS 316.360. The Admissions Act provides no protection to the 'proprietor' after his business income is earned. Thereafter, on his own personal income as an individual in his non proprietary capacity, a nonresident may be taxed differently than a resident without violating the Admissions Act."

CONCLUSION

To make out a case based upon a substantial federal question, appellant must turn the *Travis v. Yale & Towne Mfg. Co.* case, 252 U.S. 60, *supra,* into a case which deals only with exemptions and ignores the distinctions drawn between deductions and exemptions. In erasing those distinctions, deductions would, in effect, be treated the same as exemptions. It is urged that the distinctions have been nicely drawn for a substantial period of time with reliance thereon by the various states and that there is no unconstitutional discrimination against citizens of other states in confining the deductions of expenses, losses, etc., in the case of nonresident taxpayers to such as are connected with income arising

from sources within the taxing state. Appellant further attempts to construe the Oregon Admissions Act as extending to other than the taxation of lands to the proprietors thereof and to make the mandates of that Act a barrier to the imposition of an income tax, the incidence of which clearly falls upon the recipients of income and is not aimed at or levied upon proprietorship. It is submitted that appellant has failed to show violations of the equal protection clause, the Privileges and Immunity Clause or the Supremacy Clause through any violation of the Oregon Admissions Act. Appellee requests dismissal of the appeal upon the grounds that the appeal does not present a substantial federal question.

Respectfully submitted,

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APPENDIX A

1. Oregon Admissions Act, Act of [Congress of] February 14, 1859, Section 4, 11 Stat. 383:

"§ 4. The following propositions be, and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said state of Oregon, to wit: *First,* That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools. *Second,* That seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the governor of said state, subject to the approval of the commissioner of the general land-office, and to be appropriated and applied in such manner as the legislature of said state may prescribe for the purpose aforesaid, but for no other purpose. *Third,* That ten entire sections of land, to be selected by the governor of said state, in legal subdivisions, shall be granted to said state for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof. *Fourth,* That all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the same to be selected by the governor thereof within one year after the admission of said state, and when so selected, to be used or disposed of on such terms, conditions and regulations as the legislature shall direct: *Provided,* That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any

individual or individuals, shall by this article be granted to said state. *Fifth,* That five percentum of the net proceeds of sales of all public lands lying within said state which shall be sold by congress after the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to said state, for the purpose of making public roads and internal improvements, as the legislature shall direct: *Provided,* That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents. *Sixth,* And that the said state shall never tax the lands or the property of the United States in said state: *Provided, however,* That in case any of the lands herein granted to the state of Oregon have heretofore been confirmed to the territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act."

2. Act of June 3, 1859, Section 1 [Oregon] First Extra Session, 29; Deady's Laws, 1866, 132; Vol. 5, p. 1169, Oregon Revised Statutes:

"WHEREAS, the congress of the United States did pass an act, entitled, 'An act for the admission of Oregon into the Union,' approved the fourteenth day of February, one thousand eight hundred and fifty-nine; which said act contains the following propositions for the free acceptance or rejection of the state of Oregon, in the words following: [Section 4 of the Oregon Admissions Act was quoted in full]

"§ 1. That the six propositions offered to the people of Oregon in the above recited portion of the act of congress aforesaid, be, and each and all of them are hereby accepted; and for the purpose of complying with each and all of said propositions hereinbefore recited, the following ordinance is declared to be irrevocable without the consent of the United States, to wit:

"*Be it ordained by the legislative assembly of the state of Oregon,* That the said state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations congress may find necessary for securing the title in said soil to the *bona fide* purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents; and that the said state shall never tax the lands or property of the United States within said state."

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In the Supreme Court
of the United States

OCTOBER TERM 1965

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v.

STATE TAX COMMISSION,
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On Appeal from the Supreme Court of the State of Oregon

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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